Supreme Court, U.S.
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No. 98-1038

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROLF LARSEN,

Petitioner,

v.

ROY C. AFFLERBACH, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI

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1498

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Corrections to Respondents' Facts 1

Statement of Additional Facts 2

Reasons for granting the Writ 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Boddie v. Connecticut, 401 U.S. 371 (1971) . . . 10

Bogan v. Scott-Harris,
523 U.S. 44, 118 S.Ct 966 (1998) 5,6

Brown v. Griesenauer,
970 F.2d 431 (8th Cir. 1992) 4,5

Davis v. Passman, 422 U.S. 228 (1979) 7

Eastland v. U.S. Servicemen's Fund,
421 U.S. 491 (1975) 6

Forrester v. White, 484 U.S. 219 (1988) 6

Goldberg v. Kelly, 397 U.S. 254 (1970) 10

Gravel v. U.S., 408 U.S. 606 (1972) 6

Guarino v. Larsen,
821 F.Supp. 1040 (E.D.Pa. 1992) 10

Humphreys v. D.E.A.,
96 F.3d 658 (3d Cir. 1996) 2

In re Franciscus,
471 Pa. 53, 369 A.2d 1190 (1977) 8,9

In re Investigation by Dauphin County Grand Jury (No. 2),
332 Pa. 342, 2 A.2d 802 (1938) 7

In re 1991 Pa. Leg. Reapp. Comm.,
530 Pa. 335, 609 A.2d 132 (1992) 10

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 6

Larsen v. Senate,
166 Pa.Cmwlth. 472, 646 A.2d 694 (1994) . . . 8

Marshall Impeachment Case,
363 Pa. 326, 69 A.2d 619 (1949) 8

Matters of Judges Glancey and Chiovero,
515 Pa. 201, 527 A.2d 997 (1987) 8,9

Spallone v. U.S., 493 U.S. 265 (1990) 6

Sweeney v. Tucker,
473 Pa. 493, 375 A.2d 698 (1977) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) . . . 6,7

U.S. v. Johnson, 383 U.S. 169 (1966) 6

Webster v. Doe, 486 U.S. 592 (1988) 7

U.S. Constitution and Statute:

Article I, § 6, clause 1 7

Fourteenth Amendment 7

42 U.S.C. § 1983 7

Other Authorities:

Black's Law Dictionary (5th Ed. 1979) 5

Pa. Legislative Journal--Senate, 1779 8

Pa. Legislative Journal--Senate,
February 27, 1794 8

Pa. Legislative Journal--Senate,
January 13, 1803 8

Proceedings of the Constitutional Convention
of 1776 8

Proceedings of the Council of Censors, 1784 . . . 8

CORRECTIONS TO RESPONDENTS' COUNTER STATEMENT OF THE CASE

Respondents' counter-statement of the case (p. 1) is inaccurate. In November 1977, petitioner was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania, and in November 1987, he won a retention election for an additional 10-year term beginning in January 1988.[1]

Respondents mislead by repeatedly referring to petitioner's "conviction on state drug charges," falsely implying that he was involved with illegal drugs. This is an improper attempt to place petitioner in a bad light. Although irrelevant to this proceeding because petitioner was acquitted by the Senate on the article relating to controlled substances, he wishes to set forth this matter accurately.

On October 28, 1993, Mr. Larsen was charged with criminal conspiracy and 28 other violations of the Pa. Controlled Substances Act, alleging he had obtained medically needed prescription tranquilizers for his own use, whereby his personal physician issued prescriptions in the names of other persons, with their consent, to protect his privacy. That same day, the Supreme Court relieved him from all judicial duties, in effect suspending him, but he continued to receive his full salary and all health and medical benefits.[2]

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[1]Petitioner was not "re-elected," as respondents say (p.2), he won a "retention election," pursuant to Pa. Const., Art. V, § 15(b). In a retention election, the electorate votes yes or no to retain a judge. The judge does not run against an opponent, as in a House or Senate race.

[2]The October 23, 1993, order did not say anything about "criminal charges," contrary to respondents' assertion (p. 1).

On March 10, 1994, the PA Judicial Conduct Board ("JCB") filed an application with the PA Court of Judicial Discipline ("CJD") for an interim order requesting the suspension of Mr. Larsen without pay. On March 25, 1994, the Court of Judicial Discipline denied the application.

On April 9, 1994, following trial in the Court of Common Pleas, Allegheny County, PA, Mr. Larsen was convicted of two counts of criminal conspiracy with his doctor, Earl A. Humphreys, M.D., the unindicted co-conspirator, to issue medically needed tranquilizers in the names of third parties, with their consent, so as to protect his privacy. Privacy was medically necessary for successful treatment. Mr. Larsen was acquitted of all other charges. DEA revoked the certificate of Dr. Humphreys to write prescriptions for controlled substances, but this decision was remanded for a new hearing directing that the issue of patient privacy be taken into account. *Humphreys v. D.E.A.*, 96 F.3d 658 (3d Cir. 1996).[3] Dr. Humphreys has since died.

On June 3, 1994, upon the application of the JCB, the CJD issued an order directing the suspension of Mr. Larsen without pay. One-half of the members of the JCB and CJD are appointed by the Supreme Court of Pennsylvania.[4]

On June 13, 1994, in the criminal action, Mr. Larsen was sentenced to probation, community service, removal from

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[3]Paradoxically, the Allegheny County judge who presided over Mr. Larsen's criminal trial, W. Terrance O'Brien, did not permit Mr. Larsen to introduce evidence of privacy to show, among other things, lack of criminal intent. Appeal is pending.

[4]The CJD did not remove petitioner from office, contrary to respondents' assertion (p. 1).

office,[5] and payment of costs. On August 5, 1996, the Superior Court of Pennsylvania vacated sentence and remanded for sentencing based on only one conspiracy count, not two. In May 1997, Judge O'Brien imposed the same sentence as he imposed on June 13, 1994. Appeal is pending.

STATEMENT OF ADDITIONAL FACTS

Petitioner alleges serious Fourteenth Amendment Due Process defects in the impeachment proceedings leading to his removal from office and bar from ever holding office of profit or trust in Pennsylvania. The amended complaint, ¶ 58(a)-(r) [petition appendix A146-A148], sets forth many such defects, among others:

> "(a) Most members of the Senate, who were not members of the Committee, did not hear any evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings."
>
> "(d) The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established."
>
> "(e) The Committee and the Senate refused Justice Larsen's request that they adopt rules of evidence for the hearings, and, in fact, rules of evidence were never adopted."
>
> "(f) Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not

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[5]A public official convicted of an "infamous" crime may be removed from office. The criminal trial judge "deemed" petitioner's criminal conspiracy to be an "infamous" crime.

afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report."

"(g) The Final Report was misleading and did not accurately or fully represent the facts produced at trial."

"(h) During the evidentiary hearings and closing arguments, Justice Larsen was precluded from establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee."

"(i) Justice Larsen was precluded from effectively cross-examining adverse witnesses."

"(n) Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators."

"(o) Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee."

REASONS FOR GRANTING THE WRIT

Legislative immunity

Respondents try to distinguish *Brown v. Griesenauer*, 970

F.2d 431 (8th Cir. 1992), by asserting that impeachment proceedings authorized by state statute are different from those authorized by state constitution, and that the *Brown* analysis of legislative and judicial function was dicta.

Brown explicitly rejected this argument, and held that the basis in state law of impeachment authority was not determinative of the nature of impeachment. Whether authority to conduct impeachment proceedings is delegated to a legislative body, by constitution or statute, impeachment proceedings are not legislative acts, but are acts that happen to be done by legislators. The source of authority, like the branch of government authorized, does not determine the nature of any immunity. Respondents offer no authority or analysis that the source of impeachment authority is relevant to determining the nature of official immunity.

Brown's analysis of whether aldermen were entitled to legislative or judicial immunity is not dicta. *Black's Law Dictionary* (5th Ed. 1979), defines *obiter dictum* as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand."

The issue was clearly raised on appeal and *Brown* squarely decided, that the aldermen, sitting as a board of impeachment as to the mayor, were acting in a judicial rather than legislative capacity, which determination was "essential to determination of the case," and thus was not *obiter dictum*.

The Third Circuit's decision not to follow *Brown* on the ground that municipal legislators are distinct from state legislators for immunity purposes [A35] is contrary to *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct 966, 971 (1998).

"The rationales for according absolute immunity to

federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."

Bogan said "absolute legislative immunity attaches to all actions taken in the sphere of legislative activity," citing *Tenney v. Brandhove*, 341 U.S. 367 (1951), and "whether an act is legislative turns on the nature of the act." In *Bogan*, a mayor was granted legislative immunity when participating in the legislative process (i.e., preparing a budget for submission to city council). *Tenney* held that California state senators were entitled to legislative immunity.[6]

This court should accept this case to resolve the confusion and conflict over the scope of legislative immunity between a "label" approach, followed in this case by the Third Circuit, and the "functional" approach, applied in *Bogan* and *Brown*, and well described in *Forrester v. White*, 484 U.S. 219, 224 (1988), whereby the immunity afforded is based on the "nature of the functions with which a particular official or class of officials has been lawfully entrusted."

The federal source of legislative immunity is the Speech or Debate Clause, U.S. Const., Art I, § 6. This court has made "clear" that the central role of the Speech or Debate Clause is to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975), citing *U.S. v. Johnson*, 383 U.S. 169, 181

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[6]This "same doctrine of legislative immunity" was applied to regional legislators in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979). *See, Spallone v. U.S.*, 493 U.S. 265, 279 (1990)(local legislators).

(1966), and *Gravel v. U.S.*, 408 U.S. 606, 617 (1972).

This "central role" of the Speech or Debate Clause is not implicated in this action, where there are no issues of "intimidation of legislators by the executive" or "accountability before a hostile judiciary." Indeed, because this action involves federal court review of state action, which implicates the Civil War amendments and subsequent legislation, the Speech or Debate Clause has little place in analyzing whether state legislators have legislative immunity with respect to actions affecting federal constitutional rights of petitioner in being removed from office.

Dissenting in *Tenney*, but undisputed, Justice Douglas said [341 U.S. at 382-83]:

> "May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? * * *
>
> "It is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government for an illegal and corrupt purpose, the reason for the immunity ends."

Respondents' arguments in favor of legislative immunity overlook the weightier arguments that the traditional role of federal courts is to decide whether state governmental determinations violate the federal constitutional rights of individuals adversely affected, the purpose of the Fourteenth Amendment and 42 U.S.C. § 1983. *Davis v. Passman*, 422 U.S. 228, 236 (1979); *Webster v. Doe*, 486 U.S. 592 (1988).

Pennsylvania cases cited by respondents support

petitioner. *In re Investigation by Dauphin County Grand Jury (No. 2)*, 332 Pa. 342, 2 A.2d 802, 803 (1938), authorized judicial review of impeachment proceedings to ensure they are within constitutional lines. *Accord, Larsen v. Senate,* 166 Pa.Cmwlth. 472, 646 A.2d 694 (1994), affirmed by the Supreme Court of Pennsylvania in an unpublished order.

Marshall Impeachment Case, 363 Pa. 326, 341-345, 69 A.2d 619 (1949), held that: each member of City Council, sitting in impeachment, was required to be present in order to see and hear witnesses; any member not present during presentation of evidence was disqualified from voting on any charge relating to such evidence; and, an impeachment trial must be conducted in the manner in which common pleas trials are conducted, including as to evidentiary rulings.

Historically, the Penn. Senate has viewed impeachment proceedings as judicial in nature. *See, Proceedings of the Constitutional Convention of 1776*, p. 61; *Proceedings of the Council of Censors, 1784*, p. 74; *Pa. Legislative Journal--Senate*, for 1779 (trial of Judge Francis Hopkinson); *Pa. Legislative Journal--Senate*, February 27, 1794 (trial of Comptroller-General John Nicholson); *Pa. Legislative Journal--Senate*, January 13, 1803 (trial of Judge Addison).

Constitutionally protected interests

Petitioner had both property and liberty interests in both his position as justice of the Supreme Court of Pennsylvania and in not being barred from holding any office of trust or profit in Pennsylvania.

In re Franciscus, 471 Pa. 53, 369 A.2d 1190 (1977), and *Matters of Judges Glancey and Chiovero*, 515 Pa. 201, 527 A.2d 997 (1987), show that Pennsylvania judges have property interests in their positions.

Former Justice of the Peace Franciscus contended that by issuing a suspension order before receiving a recommendation of the Judicial Inquiry and Review Board, the Supreme Court of Pennsylvania had deprived him of his office without due process of law. *Franciscus* held [369 A.2d at 1194]:

> "Here, petitioner's rights have been fully protected by the immediate referral of the matter of the Judicial Inquiry and Review Board. The suspension in the instant case cannot be considered a Final determination as to the right of petitioner to hold his office since the suspension remains effective only until disposition is made by the Board. Thus, petitioner will be granted a hearing, a full opportunity to present evidence in his behalf and to cross examine witnesses against him.
>
> "Footnote 7. In view of the Commonwealth's interest in maintaining the integrity of the judiciary, and because the petitioner will be afforded a full hearing with the opportunity to present evidence in his behalf and to confront the witnesses against him prior to any Final determination affecting his position, we believe that petitioner's constitutional rights to the due process and equal protection of the law have not been violated. See, *Boddie v. Connecticut*, 401 U.S. 371, 378-79 & n.6 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 & n.10 (1970). Thus, we find petitioner's argument, that the order of this Court suspending him from his office denied him due of his state and federal constitutional rights, to be unpersuasive."

Glancey is stronger authority, because former Judges Glancey and Chiovero were granted relief under the Due Process Clause of the Fourteenth Amendment. *Glancey* held the due process rights of the two judges were violated when the Judicial Inquiry and Review Board did not give them

specific and categorical notice that the judges' claims of Fifth Amendment privilege in not answering questions concerning their finances, would amount to misconduct warranting the imposition of sanctions. See, 527 A.2d at 1000, 1005.

That Pennsylvania judicial officers have property interests in their positions is so clear that the Supreme Court of Pa. did not bother to address the question in *Franciscus* or *Glancey*, even when granting Judge Glancey relief. This was confirmed later in *Guarino v. Larsen*, 821 F.Supp. 1040, 1056-57 (E.D.Pa. 1992), reversed on other grounds, 11 F.3d 1151 (3d Cir. 1993), which found a judge's property interest rooted in the Pennsylvania Constitution.

Respondents misplace reliance on *In re 1991 Pa. Leg. Reapp. Comm.*, 530 Pa. 335, 609 A.2d 132 (1992), which in turn, relied on *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977). *Sweeney* upheld the property interest of legislators in their office, but held it was highly circumscribed. Neither case involved a judicial officer.

Conclusion

Petitioner Rolf Larsen asks the court to grant his petition for a writ of certiorari and to review the August 11, 1998, judgment of the Court of Appeals.

Respectfully submitted,

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